Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

October Term, 1988

THE CITY OF WHITTIER, a Charter City,

Petitioner,

v.

WALNUT PROPERTIES, INC.,
a California corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BURKE, WILLIAMS & SORENSEN

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QUESTIONS PRESENTED

1. Does the City of Whittier's adult business zoning ordinance, which permits adult businesses to locate in 13.4% of the area zoned for commercial uses in the City, leave open reasonable alternative avenues of communication under this Court's opinion in *City of Renton v. Playtime Theatres, Inc.*?

2. Is a party entitled to attorney fees under 42 U.S.C. § 1988 and interest under 28 U.S.C. § 1961 for work done on separate and distinct portions of a case which were vacated and for which no detailed time records were submitted?

LIST OF PARTIES

The parties to the proceedings below, which comprised four cases consolidated for disposition, were the petitioner City of Whittier and the respondent Walnut Properties, Inc.

Also named as parties in the cases below were the Whittier City Council; M. D. Klaxton, R. L. Henderson, L. A. Strong, Gene Chandler and V. A. Lopez as members of the Whittier City Council (Messrs. Henderson and Strong are no longer on the Council); James Bale, as Chief of Police, City of Whittier; J. Robert Flandrick, as City Attorney, City of Whittier; Elvin Porter as City Planner, City of Whittier; and Vincent Miranda, an individual, now deceased, who was president of respondent Walnut Properties, Inc.

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WALNUT PROPERTIES, INC.,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, City of Whittier, respectfully prays that a writ of certiorari issue to review those portions of the decision of the Ninth Circuit Court of Appeals, filed November 9, 1988, holding that the City's adult business zoning ordinance violates respondent Walnut Properties, Inc.'s right of free speech guaranteed by the First Amendment to the Constitution of the United States because it fails to leave open reasonable alternative avenues of communication and awarding respondent Walnut attorney fees under 42 U.S.C. § 1988 for all work done in the District Court, the Ninth Circuit, and

in this Court, with interest from the dates of the initial awards, even though the judgment of the District Court and the decision of the Ninth Circuit were vacated.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals appears as Appendix A and is reported at 861 F.2d 1102 (9th Cir. 1988).

Other published and unpublished decisions of the Ninth Circuit Court of Appeals, unpublished decisions of the District Court, and the Order of this Court summarily vacating a prior Ninth Circuit decision in this case appear as Appendices B through N.

JURISDICTION

Respondent Walnut Properties, Inc. ("Walnut") sought injunctive and declaratory relief under 42 U.S.C. § 1983 against enforcement of Petitioner City of Whittier's ("City") adult business ordinance which was modeled after the ordinance approved by this Court in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) ("Walnut I"). In a separate action, Walnut sought further injunctive and declaratory relief and damages against the City, the City Planning Director and the City Attorney under 42 U.S.C. § 1983 ("Walnut II"). Walnut sought attorney fees under 42 U.S.C. § 1988 in both actions.

Federal jurisdiction was based on 28 U.S.C. § 1343 subdivisions (3) and (4).

The jurisdiction of the Supreme Court to review the judgment is invoked under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment to the United States Constitution provides

> Congress shall make no law . . . abridging the freedom of speech . . . .

The full texts of Whittier's Ordinance Nos. 2327, 2257, 2254, 2138, 2121 and 2116 appear as Appendices O through T.

STATEMENT OF THE CASE

The Ninth Circuit Court of Appeals, purporting to follow this Court's decision in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), held the City's adult business ordinance to be unconstitutional on the basis that it denies Walnut a reasonable opportunity to open and operate an adult business in the City and would force the closure of all adult businesses existing at the time the Ordinance was adopted.

Whittier, like the City of Renton, is a small city (70,000 residents) located immediately adjacent to a large metropolitan area (Los Angeles). By 1977, Whittier had experienced a rapid growth of adult businesses. Whittier adopted an urgency ordinance to maintain the status quo so that the problems associated with adult businesses could be studied. (No. 2116, App. T.) During a seven month study, several public hearings were held, surveys made, and the experiences of many other similarly situated cities and counties, including Los Angeles County, were examined. Whittier's studies showed, among other things, depreciation in property values and an increase in crime in the areas in which adult businesses were located, including prostitution, assault and battery,

theft, arson, sexual offenses, and an influx of drunk drivers' and intoxicated pedestrians.

In February 1978, Whittier adopted a zoning ordinance (No. 2138, App. R) based on *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50, which permitted defined adult businesses in commercial and industrial zones, with separation requirements of 500 feet from residences and 1,000 feet from schools, churches, parks or other public facilities utilized by minors, and other adult businesses. The ordinance grandfathered in existing adult businesses which were in violation of the ordinance as legal non-conforming uses subject to abatement after an amortization period, in a manner approved by the California courts in *National Advertising Co. v. County of Monterey*, 1 Cal.3d 875, 878, 83 Cal. Rptr. 577, 464 P.2d 33 (1970); *Castner v. City of Oakland*, 129 Cal.App.3d 94, 96, 180 Cal. Rptr. 682 (1982) and *City of Whittier v. Walnut Properties, Inc.*, 149 Cal.App.3d 633, 644, 197 Cal. Rptr. 127 (1983).

Walnut owns and operates a chain of several dozen adult movie theaters known as the Pussycat Theaters. The Pussycat Theater in Whittier is located in the "Uptown" area, one of two major commercial centers in the City, within 1,000 feet of four churches, two of which operate full-time parochial elementary schools.

After expiration of the amortization period applicable to the Pussycat Theater, the City, after duly noticed public hearings attended by Walnut's counsel, issued an order of abatement requiring relocation of the theater. Walnut refused to comply with the order of abatement, and the City filed an action in the Los Angeles County Superior Court to enforce the order by injunction. The state court litigation resulted in an opinion by the

California Court of Appeal (*City of Whittier v. Walnut Properties, Inc.*, 149 Cal.App.3d 633) validating the ordinance, which was amended during the course of the litigation. Ordinance No. 2254, an urgency ordinance, and Ordinance No. 2257, the permanent version, deleted from the ordinance the requirement that an adult business be at least 1,000 feet from any public facility utilized by minors. App. Q and P.

During the pendency of the state court litigation, Walnut filed a lawsuit in the District Court of California, Central District, on May 7, 1981, alleging the ordinance was unconstitutional. After trial, the District Court announced its intent to hold the ordinance invalid as applied to Walnut because there was insufficient evidence presented to the City Council to support its conclusion that separation of the theater from churches by 1,000 feet was reasonably required to protect the public health, safety and welfare.

After the District Court announced its intended decision, the City held public hearings at which additional evidence was presented supporting separating churches from an adult business by 1,000 feet. Based on the additional evidence, the provision was reenacted by adoption of Ordinance No. 2327, App. O. The District Court refused to take judicial notice of the reenacted ordinance and entered judgment as announced. App. N and M.

In response to the reenactment, Walnut filed a second action in the District Court on July 10, 1984, "Walnut II", attacking the constitutionality of Ordinance No. 2327, and seeking declaratory and injunctive relief and damages against the City, the City Attorney and the City Planning Director. On cross motions for summary judgment, the District Court held that

Ordinance 2327 was unconstitutional and Messrs. Flandrick and Porter were not entitled to immunity. App. I. (Walnut voluntarily dismissed its damage claim against the City.)

The Ninth Circuit's first decision in Walnut I holding the ordinance unconstitutional is contained in an unpublished Amended Memorandum, filed September 30, 1985. App. L.

The City's appeal to this Court from that opinion resulted in an Order vacating the decision and remanding the matter to the Ninth Circuit. *City of Whittier v. Walnut Properties, Inc.*, 475 U.S. 1042 (1986) (mem.) App. K.

The Ninth Circuit, in turn, vacated the District Court's decision and remanded. *Walnut Properties, Inc. v. City of Whittier*, 808 F.2d 1331 (9th Cir. 1986). App. H. The Ninth Circuit also vacated and remanded the District Court's decision in Walnut II. App. G.

On remand, the District Court again held that both ordinances were unconstitutional on grounds substantially similar to those in its initial decisions and that Flandrick and Porter were not entitled to immunity. App. C and D. The District Court reinstated all attorney fee awards with interest from the date of the initial awards. App. B. The City appealed. The appeal resulted in the decision which is before this Court.

REASONS FOR GRANTING THE WRIT

1. The Ninth Circuit's Decision Holding That Whittier's Adult Business Zoning Ordinances Fails To Provide Reasonable Alternative Avenues of Communication Conflicts With The *Renton* Decision And With Other Post-*Renton* Decisions

This court's opinion in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, established some well-defined constitutional parameters for adult business zoning regulations. However, in *Renton's* wake, uncertainty and lack of uniformity prevails concerning the second prong of the *Renton* test: When does an adult business zoning ordinance allow for "reasonable alternative avenues of communication"?

The *Renton* ordinance allowed adult theaters to locate on 520 acres, representing approximately 5% of the 15.3 square mile land area of the City of *Renton*. This Court rejected the Ninth Circuit's conclusion that the 520 acres did not contain constitutionally "available" sites because a substantial part of the area was occupied by: (1) a sewage disposal site and treatment plant; (2) a horseracing track and environs; (3) a business park containing buildings suitable only for industrial use; (4) a warehouse and manufacturing facilities; (5) a Mobil Oil tank farm; and (6) a fully developed shopping center. *Playtime Theaters, Inc. v. City of Renton*, 748 F.2d 527, 534 (9th Cir. 1984) *rev'd., City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

In rejecting the argument that Renton's ordinance relegated adult theaters to an "industrial wasteland" that was effectively unavailable because it was either already

occupied or unsuited for use by movie theaters, this Court said:

> "That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. And although we have cautioned against the enactment of zoning regulations that have 'the effect of suppressing, or greatly restricting access to, lawful speech,' *American Mini-Theatres,* 427 U.S. at 71, n.35, 49 L.Ed.2d 310, 96 S.Ct. 2440 (plurality opinion), we have never suggested that the First Amendment compels the government to insure that adult theaters, or any other kinds of speech related businesses for that matter, will be able to obtain sites at bargain prices. See id., at 78, 49 L.Ed.2d 310, 96 S.Ct. 2440 (Powell, J., concurring) ("The inquiry for First Amended purposes is not concerned with economic impact"). In our view, the First Amendment requires ony that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the City, and the ordinance before us easily meets this requirement." (475 U.S. at 42.)

In the case now before this Court, as in the *Renton* case, the Ninth Circuit imposed a heavier burden on the City than is constitutionally required to show that an adult business zoning ordinance allows for reasonable alternative avenues of communication.

The record before the Ninth Circuit showed that the land area of Whittier is 12.32 square miles; that 10.2%,

or 742.5 acres, of the City is zoned for commercial uses (C-2, C-3 and M zones); and that 99.5 acres, or 13.4% of the area zoned for commercial uses, is available to adult businesses. Of the remaining land area in the City, 75.5% is occupied by residential uses and street and railroad rights of way; 1% by office buildings; and the remaining 13.3% is occupied by pubic and quasi-public uses, such as parks and schools, a courthouse and a civic center.

Whittier is approximately two-thirds the size of Renton in area. Although it is geographically smaller than Renton, Whittier has more than twice as many residents. This difference in population density explains why Whittier has less gross acreage zoned for commercial and industrial uses than Renton. When the differences in land area and population density are taken into account, the approximately 1.4% of Whittier which is available for adult businesses to locate compares favorably to the approximately 5% permitted by the Renton ordinance and approved by this Court.

The evidence before the court also showed that the sites available to adult businesses in Whittier are located throughout the City, along major thoroughfares, in economically viable areas, including in one of Whittier's two shopping centers, and that a number of adult theaters were located a short distance from Whittier.

The Ninth Circuit found that the 99.5 acres zoned for adult uses were not "available" by shifting its focus from the potential sites available for Walnut to relocate, to "the number of potential sites the ordinance leaves available for the location of adult businesses" (App. A13), speculating that if other adult businesses desired to locate in the City, they would be unable to do so. App. A19. The Ninth Circuit held that the 1,000

foot separation requirement between two adult businesses in the Whittier ordinance was an "intrinsic limitation," that made "an estimation of total available acreage [ ] next to meaningless." App. A13. The Ninth Circuit concluded that the City's regulations "would only allow a small handful of adult businesses to operate within the City of Whittier." App. A15.

The Ninth Circuit distinguished Whittier's ordinance from the Renton ordinance on the additional grounds that the Renton ordinance regulated only adult theaters and not other types of adult businesses (App. A19) and concentrated adult businesses rather than dispersing them. App. A16. In *Renton*, however, this Court refused to speculate on what effect Renton's ordinance would have on parties not before the Court (475 U.S. at 52-53), and held that the constitutionality of an adult business ordinance does not depend on whether the effect is to concentrate or disperse adult businesses. (475 U.S. at 52.)

The Ninth Circuit also distinguished *Renton* on the ground that in *Renton,* the theater had not yet opened when Renton's ordinance was adopted. This is a distinction without a difference as the effect of Whittier's ordinance would be the same whether or not the Pussycat Theater were in existence at the time the ordinance was adopted—it still would be required to locate at a site permitted by the ordinance.

The Ninth Circuit relied on cases decided prior to this Court's decision in *Renton.* Citing *Alexander v. City of Minneapolis,* 698 F.2d 936 (8th Cir. 1983), the Ninth Circuit noted that "the 12 sites in that case significantly outweigh the number of sites allowed under the City's ordinance in this case." App. A17.

Minneapolis has a population of approximately 369,000 people, and encompasses 55 square miles (The World Almanac and Book of Facts 1986; p. 665); it has over 5 times as many people as Whittier and is 4.5 times as large. The City of Whittier and the City of Minneapolis are not comparable.

The Ninth Circuit's reliance on *Alexander* was misplaced for the further reason that, at the time the Minneapolis ordinance was adopted, there were over thirty adult uses operating in the City, including 5 adult theaters and 10 adult bookstores. All but one or two of these would have had to relocate and compete for space with an additional 18 regulated adult uses. As there were at most only twelve possible sites for relocation, sites were not available for all the bookstores and theaters which would be required to relocate, and there would not have been a single location in Minneapolis for the opening of new theaters or bookstores. (698 F.2d at 938.)

In this case, there is one adult theater in the City which would have to relocate; thus Whittier's ordinance does not have the effect of the Minneapolis ordinance. There was no evidence before the court that Walnut would have to compete with other adult businesses for the available sites, and there was no basis in the record for assuming that others desired to open and operate adult businesses in the City, or that if there were others who desired to operate an adult business in the City, they would be unable to do so.

CLR Corp. v. Henline, 702 F.2d 637 (6th Cir. 1983), the other case relied on by the Ninth Circuit, involved an adult business ordinance adopted by the town of Wyoming, Michigan, a city of 60,000 residents with an

area of 25 square miles. While comparable in population to Whittier, the town is 2.5 times larger than Whittier in area.

The *Henline* court found that the Wyoming ordinance denied access to adult businesses because the ordinance permitted only 2 to 4 adult businesses in a half-mile strip of the city, and concentrated the uses in one area. In contrast, the Ninth Circuit in this case found that the "small handful" of sites left open by the Whittier ordinance were in 3 separate areas of the City. App. A15.

Federal and state courts addressing the issue after *Renton* have interpreted what is meant by "reasonable alternative avenues of communication" in a variety of ways, being similar only in that all have interpreted *Renton* more liberally than has the Ninth Circuit.

In *S & G News v. City of Southgate,* 638 F.Supp. 1060 (E.D. Mich. 1986) *aff'd.* 819 F.2d 1142 (6th Cir. 1987), the court upheld an ordinance which, like Whittier's, limited adult businesses to certain zones and then dispersed adult uses within those zones. The court held:

> "Southgate clearly allows sufficient alternative means of expression, since adult uses are allowed in C-3 commercial districts, which comprised 2.3 percent of the land in Southgate." (638 F.Supp at 1066.)

The court looked only at the gross acreage available under Southgate's ordinance without considering the effect of the further restrictions in the ordinance that not more than two adult uses may locate within 1,000 feet of each other or within 500 feet of a residence.

In *Lindsay v. Papageorgiou,* 751 S.W.2d 544 (Tex. App. 1988), the court upheld an adult business

ordinance adopted by Harris County, Texas. The court found the ordinance did not violate the First Amendment because it did not on its face ban the operation of adult uses or limit their number. The court rejected the argument that the County had failed to make an offer of proof that there were any alternative sites available, stating:

> "The regulations limit only the locations where appellee may operate her enterprise; therefore, she has not been denied reasonable opportunities to conduct her business without violating regulations. The county is under no duty to insure that appellee be afforded a commercially viable site in which to locate. *City of Renton v. Playtime Theatres, Inc.*, 106 S.Ct. at 932.
>
> "The regulations in question impose only a minimal or incidental burden on protected expression, as they are nothing more than a limitation on the place where such expression may be exercised; thus, they meet appellee's First Amendment challenge." (751 F.2d at 550.)

In *Christy v. City of Ann Arbor*, 824 F.2d 489 (6th Cir. 1987) *cert. denied*, ___ U.S. ___, 98 L.Ed.2d 978, 108 S.Ct. 1013 (1988), the City's adult business ordinance restricted adult uses to an area which totalled 0.058 square miles and contained only 0.23 of 1% of the land area of the City. The Court, by a vote of 2-1, remanded the case to the District Court to determine whether the ordinance severely restricts First Amendment expression. Senior Circuit Judge Brown dissented from this portion of the opinion, finding that the ordinance allowed adult uses to locate within the heart of Ann Arbor's central business zone and did not, for all practical purposes, eliminate them. (824 F.2d at 493.)

In *Town of Islip v. Caviglia,* 532 N.Y.S.2d 783, 141 App. Div. 2d 148 (1988), after reviewing numerous decisions of the state and federal courts issued since *Renton,* the court determined that an ordinance which impacted existing adult uses and limited adult businesses to industrial zones was constitutional because the town contained over 6,000 acres zoned for industrial uses which were scattered throughout the town in various stages of development and contained 12 miles of running footage on open roads. In making its determination, the court did not consider how availability of sites was affected by the ordinance's requirement that an adult business not be located within one-half mile radius of another adult business. (532 N.Y.S.2d at 785, n.2.)

The California state courts have given cities wide berth in regulating adult businesses and have consistently upheld ordinances substantially similar to Whittier's. (See, e.g. *City of Vallejo v. Adult Books,* 167 Cal.App.3d 1169, 213 Cal. Rptr. 143 (1985); *Strand Property Corp. v. Municipal Court,* 148 Cal.App.3d 882, 200 Cal. Rptr. 47 (1983); *City of Whittier v. Walnut Properties, Inc.,* 149 Cal.App.3d 633; *County of Sacramento v. Superior Court,* 137 Cal.App.3d 448, 187 Cal. Rptr. 154 (1982); *Walnut Properties, Inc. v. City Council of Long Beach,* 100 Cal.App.3d 1018, 161 Cal. Rptr. 411 (1980).) In *City of Vallejo,* the court found that Vallejo's ordinance was facially broader than that in *Young* and that it had no grandfather clause:

> "Still, the ordinance does not impose an outright ban; . . . Permissible locations available to adult uses are restricted by the ordinance, but not legislated out of existence." (100 Cal.App.3d at 1180.)

Two adult business zoning cases are pending before this court on petitions for writ of certiorari, *M.E.F. Enterprises, Inc. v. Houston,* 837 F.2d 1268 (5th Cir.) *petition for cert. filed* 57 U.S.L.W. 3001 (June 10, 1988) (No. 87-2052), and *M.J.R. v. Dallas,* 837 F.2d 1298 (5th Cir.) *petition for cert. filed* 57 U.S.L.W. 3001 (June 13, 1988) (No. 87-2051). Both cases present the questions of what constitutes reasonable alternative avenues of communication under *Renton* and whether adult business zoning ordinances may be applied to existing businesses.

These decisions illustrate the need for guidance from this Court. Does an ordinance provide "reasonable alternative avenues of communication" if it does not on its face ban adult businesses, or must so-called "intrinsic limitations" in the ordinance be considered? Does the constitutionality of an adult business zoning ordinance turn on the particular geographic characteristics of the city involved? Is gross acreage or the number of sites determinative? Is land area, population, population density, and/or the particular location of sites within a City to be considered? Is an adult business zoning ordinance which regulates only adult theaters to be judged under a standard different than that which is used for ordinances which regulate all adult uses? Is an ordinance which affects existing adult businesses subject to a different standard than an ordinance which affects only new adult uses?

Hundreds of cities and counties in California[1] and hundreds, if not thousands, more in other jurisdictions

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[1] On the prior occasion of this case coming before this Court, 74 California cities joined as amici curiae on behalf of Whittier.

have adopted ordinances regulating the location of adult businesses. Because so many jurisdictions are involved, it is important for this Court to provide an analytical framework so that cities and counties will know when they have provided "adequate alternative channels of communication" without the necessity of engaging in protracted legal battles, producing conflicting and contrary legal opinions.

2. The Attorney Fee Awards And Interest Thereon For Work Done On Vacated Portions Of A Case And For Which No Detailed Time Records Were Provided Was Erroneous

a. Fees Should Not Be Awarded For Work Done On Unsuccessful Claims In Vacated Decisions.

The Ninth Circuit affirmed the District Court's award of attorneys fees to Walnut. App. A27. The District Court awarded Walnut all the fees it requested for all time spent litigating "Walnut I", as follows:

- $39,035.00 for work in the District Court from May 7, 1981 to May 21, 1984, and interest thereon from and after May 21, 1984.

- $25,478,00 for work in connection with the appeal which culminated in the Amended Memorandum of September 30, 1985, and interest thereon from January 21, 1986.
- $18,400.00 for services rendered since January 21, 1986. App. B.

Entitlement to fees under 42 U.S.C. § 1988 is limited to prevailing parties. Even if this Court were to allow the Ninth Circuit's decision to stand, it should rectify the injustice of allowing an award of attorney fees for work done in the trial and appellate courts on issues on which Walnut did not prevail and which resulted in District Court and Ninth Circuit decisions vacated by this Court.

Walnut's initial success in the District Court rested on the court's conclusion that the City had not provided sufficient justification for prohibiting Walnut from operating within 1,000 feet of a church App. M. The District Court's findings also stated that the City had failed to meet its burden of proving that separating a church from an adult theater furthered a compelling government interest unrelated to suppression of free expression, the 1,000 foot separation between an adult theater and a church made it impossible to operate an adult theater in the central business district of Whittier, and the ordinance would have the effect of total exclusion of adult theaters from the City. App. N.

On appeal, the Ninth Circuit affirmed the District Court decision, holding that the City could not rely on the experience of other cities to justify separating churches from adult businesses by 1,000 feet; Walnut's expert testified that there were only twelve acres in the City, in a shopping center, where adult businesses were

permitted to locate; this area was not available because of "the reluctance of a shopping center owner to lease to such a theater and the unlikelihood of an appropriate vacancy"; and "a motivating factor" of the City was to suppress speech. App. L.

This Court's opinion in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, rendered the District Court and Ninth Circuit opinions erroneous in every respect, resulting in the Order of this Court vacating the Ninth Circuit opinion and remanding the matter to that court, with costs to the City. App. K.

The Ninth Circuit, in turn, vacated the District Court's opinion and remanded. *Walnut Properties, Inc. v. City of Whittier,* 808 F.2d 1331 (9th Cir. 1986). App. H. The Ninth Circuit also awarded costs to the City. App. E.

Upon remand, the District Court entered Findings of Fact and Conclusions of Law substantially similar to those entered initially in 1984. App. F. The Ninth Circuit disregarded the District Court findings, and affirmed on the basis that the ordinance allowed "only a small handful" of adult businesses to locate in Whittier. App. A. This was not the issue on which Walnut initially prevailed either in the District Court or in the Ninth Circuit for which the attorney fees were awarded.

Most of the fees awarded for work done after January 21, 1986 related to Walnut's effort to persuade this Court to affirm the Ninth Circuit's decision and then, when that failed, to persuade the Ninth Circuit to reinstate its prior decision without remand to the District Court. That attempt also was unsuccessful.

Award of fees to Walnut is contrary to *Hensley v. Eckerhart,* 461 U.S. 424 (1983), holding that a party is not entitled to fees for work done on unsuccessful

claims, and *Hanrahan v. Hampton,* 446 U.S. 754 (1980), holding that a plaintiff is not entitled to a fee award where he did not prevail on the merits in the appellate court, but had secured only a reversal and remand for a new trial. The instant case differs somewhat from *Hanrahan* in that Walnut was successful after remand in persuading the District Court and the Ninth Circuit of the merits of its claim. However, it would be an anomaly for Walnut to be deemed a prevailing party for purposes of the attorney fees challenged here when both the decisions for which it seeks fees were vacated, and costs were awarded to the City. (*See Toussaint v. McCarthy,* 826 F.2d 901, 904, n.3 (9th Cir. 1987); *Jordan v. Allain,* 619 F.Supp. 98, 109-110 (D.C. Miss. 1985); *see also Buin v. Baughard,* 687 F.2d 859 (6th Cir. 1982) *rev'd, Kelly v. Metropolitan County Bd. of Educ.,* 773 F.2d 677 (6th Cir. 1985).

b. Interest on the Awards

The fees which the Ninth Circuit affirmed include interest accruing from the dates of the initial attorney fee awards.

The attorney fee awards were vacated along with the decisions on the merits. App. H4-5, n. 1. As "a judgment vacated on appeal is of no further force and effect" (*Riha v. International Telephone & Telegraph,* 533 F.2d 1053, 1054-55 (8th Cir. 1976), there is no basis for awarding interest from the date of the original fee orders.

In *Hysell v. Iowa Public Service Co.,* 559 F.2d 468, 476 (8th Cir. 1977), the court held that where a judgment has been vacated on appeal, only the date of entry of the second judgment could be the basis for calculating post-judgment interest on attorney fees under 28 U.S.C. § 1961.

This issue was recently before this Court in *Chattem, Inc. v. Bailey,* 838 F.2d 149 (6th Cir.) *cert. denied,* ___ U.S. ___, 100 L.Ed.2d 931, 108 S.Ct. 2831 (1988). In dissenting from the denial of certiorari, Justice White noted the conflict among the circuits on the proper application of 28 U.S.C. § 1961 where, as here, a judgment is later vacated on appeal. (100 L.Ed.2d at 932.)

c. Failure to Submit Proper Documentation

The City has opposed the awards of attorney fees throughout the course of this litigation on the ground, *inter alia,* that Walnut's counsel did not provide adequate documentation to substantiate the number of hours he claimed were spent on the case. These arguments were rejected, and Walnut was awarded all fees requested based solely on the declarations of Walnut's counsel, containing nothing more than vague descriptions regarding how large blocks of time were spent.

The Court of Appeals for the District of Columbia, First, Second, and Tenth Circuits require contemporaneous time records for recovery of fees. *National Assn. of Concerned Veterans v. Secretary of Defense,* 675 F.2d 1319, 1327 (D.C. Cir. 1982); *Grendel's Den, Inc. v. Larkin,* 749 F.2d 945, 952 (1st Cir. 1984); *New York State Ass'n for Retarded Children v. Carey,* 711 F.2d 1136, 1148 (2d Cir. 1983); *Ramos v. Lamm,* 713 F.2d 546, 553-54 (10th Cir. 1983). Other courts accept detailed reconstructions in lieu of contemporaneous time records, but reduce claimed hours for poor recordkeeping. *Yohay v. City of Alexandria Employees Credit Union,* 827 F.2d 967, 974 (4th Cir. 1987); *Lightfoot v. Walker,* 826 F.2d 516, 522, n.7 (7th Cir. 1987); *Haitian Refugee Center, Inc. v. Smith,* 644 F.Supp. 382, 391 (S.D. Fla. 1984)

aff'd, 791 F.2d 1489, *as amended,* 804 F.2d 1573 (11th Cir. 1986).

The Ninth Circuit is one of the few remaining jurisdictions to permit the award of full attorney fees without either contemporaneous time records or some other detailed presentation of how attorney time was spent on a case.

CONCLUSION

For the reasons stated above, this Court should accept this case for plenary review.

DATED: February 7, 1989

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on February 7, 1989, I served the within *Petition for Writ of Certiorari and Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Stanley Fleishman, Esquire
2049 Century Park East
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Los Angeles, California 90067

The Honorable John Van
De Kamp
Attorney General
555 Capitol Mall
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Sacramento, California 95814

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 7, 1989, at Los Angeles, California.

Betty J. Malloy
(Original signed)